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Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee

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Summary

The appointment of a Supreme Court Justice is an event of major significance in American politics. Each appointment is of consequence because of the enormous judicial power the Supreme Court exercises as the highest appellate court in the federal judiciary. To receive appointment to the Court, a candidate must first be nominated by the President and then confirmed by the Senate. Although not mentioned in the Constitution, an important role is played midway in the process (after the President selects, but before the Senate considers) by the Senate Judiciary Committee. Specifically, the Judiciary Committee, rather than the Senate as a whole, invariably assumes the principal responsibility for investigating the background and qualifications of each Supreme Court nominee, and typically the committee conducts a close, intensive investigation of each nominee.

Since the late 1960s, the Judiciary Committee's consideration of a Supreme Court nominee almost always has consisted of three distinct stages—(1) a pre-hearing investigative stage, followed by (2) public hearings, and concluding with (3) a committee decision on what recommendation to make to the full Senate.

During the pre-hearing investigative stage, the nominee responds to a detailed Judiciary Committee questionnaire, providing biographical, professional, and financial disclosure information to the committee. In addition to the committee's own investigation of the nominee, the FBI also investigates the nominee and provides the committee with confidential reports related to its investigation. During this time, the American Bar Association also evaluates the professional qualifications of the nominee, rating the nominee as "well qualified," "qualified," or "not qualified." Finally, prior to hearings starting, the nominee pays courtesy calls on individual Senators in their offices, including Senators who do not serve on the Judiciary Committee.

Once the Judiciary Committee completes its investigation of the nominee, he or she testifies in hearings before the committee. On average, for Supreme Court nominees who have received hearings from 1975 to the present, the nominee's first hearing occurred 39 days after his or her nomination was formally submitted to the Senate by the President. Questioning of a nominee by Senators has involved, as a matter of course, the nominee's legal qualifications, biographical background, and any earlier actions as public figures. Other questions have focused on social and political issues, the Constitution, particular court rulings, current constitutional controversies, and judicial philosophy. For the most recent nominees to the Court, hearings have lasted for four or five days (although the Senate may decide to hold more hearings if a nomination is perceived as controversial—as was the case with Robert Bork's nomination in 1987, who had 11 days of hearings).

Usually within a week upon completion of the hearings, the Judiciary Committee meets in open session to determine what recommendation to "report" to the full Senate. The committee's usual practice has been to report even those Supreme Court nominations opposed by a committee majority, allowing the full Senate to make the final decision on whether the nomination should be approved. Consequently, the committee may report the nomination favorably, report it unfavorably, or report it without making any recommendation at all. Of the 15 most recent Supreme Court nominations reported by the Judiciary Committee, 13 were reported favorably, 1 was reported unfavorably, and 1 was reported without recommendation.

Additional CRS reports provide information and analysis related to other stages of the confirmation process for nominations to the Supreme Court. For a report related to the selection of a nominee by the President, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion. For a report related to Senate floor

debate and consideration of nominations, see CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

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Background

While the U.S. Constitution assigns explicit roles in the Supreme Court appointment process only to the President and the Senate,[1] the Senate Judiciary Committee, throughout much of the nation's history, has also played an important, intermediary role.[2] From 1816, when the Judiciary Committee was created, until 1868, more than two-thirds of nominations to the Supreme Court were referred to the committee, in each case by motion. In 1868, the Senate determined, as a general rule, that all nominations should automatically be referred to appropriate standing committees.[3] Since then, all but seven Supreme Court nominations, with the most recent being in 1941, have been referred to the Judiciary Committee.[4]

Since the late 1960s, the Judiciary Committee's consideration of a Supreme Court nominee almost always has consisted of three distinct stages—(1) a pre-hearing investigative stage, followed by (2) public hearings, and concluding with (3) a committee decision on what recommendation to make to the full Senate.

Pre-Hearing Stage

Committee Questionnaire

Upon the President's announcement of a nominee, the Judiciary Committee initiates an intensive investigation into the nominee's background. One primary source of information is a committee questionnaire to which the nominee responds in writing.[5] The questionnaire asks the nominee for detailed biographical and financial disclosure information,[6] with responses to some questions

[1] Article II, Section 2, clause 2, in pertinent part, provides simply that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges of the supreme Court."

[2] This scope of this report involves the consideration of a Supreme Court nomination by the Senate Judiciary Committee. For a report providing information and analysis related to the selection of a nominee for the Court by the President, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion. For a report providing information and analysis related to floor action on nominations, see CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

[3] U.S. Congress, Senate, *History of the Committee on the Judiciary, United States Senate, 1816-1981*, S. Doc. 97-18, 97th Cong., 1st sess. (Washington: GPO, 1982), p. iv.; also, U.S. Congress, Senate, *History of the Committee on Rules and Administration—United States Senate*, prepared by Floyd M. Riddick, Parliamentarian Emeritus of the Senate, S. Doc. 96-27, 96th Cong., 1st sess. (Washington: GPO, 1980). Riddick provided, on pp. 21-28, the full text of the general revision of the Senate rules, adopted in 1868, including, on p. 26, the following rule: "When nominations shall be made by the President of the United States to the Senate, they shall, unless otherwise ordered by the Senate, be referred to appropriate committees.... "

[4] The seven nominations not referred to the Judiciary Committee were Edwin M. Stanton in 1869 (former Secretary of War at time of nomination); Edward D. White in 1894 (sitting Senator); Joseph M. McKenna in 1897 (Attorney General, former U.S. Representative); Edward D. White again, in 1910, nominated to be Chief Justice; William Howard Taft in 1921 (former President); George Sutherland in 1922 (former Senator); and James F. Byrnes in 1941 (sitting Senator).

[5] As of this writing, the committee treats the questionnaire's biographical and financial disclosure sections as public information. The committee, however, treats as confidential (and not available to the news media or the public) the nominee's responses to more sensitive questions, such as whether he or she ever had been under investigation for possible violation of a civil or criminal statute.

[6] For example, the Judiciary Committee's questionnaire for Supreme Court nominee Sonia Sotomayor asked, among other things, for

- a complete employment record;

(continued...)

requiring the retrieval, listing, and summarizing of voluminous information about the nominee's past experiences or activities.[7] Because of the labor-intensive nature of the task, an Administration typically will aid the nominee in preparing and transmitting the questionnaire to the Judiciary Committee.

A chief purpose of the questionnaire is to provide members of the Judiciary Committee and their staffs with detailed pre-hearing information about the nominee. After delivery of the completed questionnaire to the committee, however, some Members may formally request in writing that the nominee provide additional information to clarify or expand on what he or she has already submitted. The nominee may then provide the committee with written responses to specific questions from the Senators, which in turn are made available as supplements to the questionnaire to all committee members prior to the start of the nominee's confirmation hearings.[8]

Committee Background Investigation

The Judiciary Committee's confidential background investigation of a Supreme Court nominee closely reviews, among other things, the nominee's past professional activities. In this review, committee members and staff examine the mission of entities that employed or otherwise retained the services of the nominee and the nature and quality of the work product of the nominee while

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- a list of all organizations in which the nominee had been a member;
- a list and copies of all her published writings and public statements;
- any judicial offices held and, if ever a judge, "the 10 most significant cases over which you presided,"
- citations for all opinions she had written, and citations to all cases in which she had been a panel member but did not write an opinion;
- a list of any cases in which a litigant or party had requested that she recuse herself as a judge due to an asserted conflict of interest, along with the reason for recusing or declining to recuse;
- identification of any position held or role played in a political campaign;
- a description of the 10 "most significant litigated matters which you personally handled, whether or not you were the attorney of record";
- teaching experience, including titles of courses and subject matter of courses taught;
- the sources, amounts and dates of all anticipated deferred income and future benefits;
- the sources and amounts of all income received during the calendar year preceding nomination and for the current calendar year;
- "potential conflicts of interest when you first assume the position to which you have been nominated"; and
- a description of instances and amount of time devoted in the past "to serving the disadvantaged."

See, concerning the Sotomayor nomination, "Committee Questionnaire and Related Materials" link on the Senate Judiciary Committee's website, at http://www.judiciary.senate.gov/nominations/supreme-court/sotomayor#Questionnaire.

[7] In 2009, for example, in response to the Judiciary Committee's questionnaire concerning her Supreme Court nomination, appellate judge Sonia Sotomayor accounted for almost 200 speeches she had delivered from the early 1990s to May 2009 and more than 140 conferences and events she had attended during her years as a federal judge. Following the initial submission of her questionnaire, Judge Sotomayor provided the committee more than 200 items of questionnaire supplement materials (including news articles, letters, memoranda, reports, videos, meeting minutes, seminar and speech transcripts, and case citations.) Ibid.

[8] For example, prior to the start, on July 13, 2009, of confirmation hearings on the Supreme Court nomination of Sonia Sotomayor, the nominee's completed questionnaire to the Judiciary Committee was supplemented by at least 10 letters to the nominee from members of the committee or from the nominee responding to the Senators' letters. See, concerning the Sotomayor nomination, "Letters to and from Members of the Committee" link on the Judiciary Committee's website, at http://judiciary.senate.gov/nominations/SupremeCourt/upload/Sotomayor-MemberLetters.pdf.

in that service. To this end, the committee might seek and attain access to the nominee's confidential written work product or to other documents that the past employer might consider of an internal nature and ordinarily not suitable for public release.[9]

If the nominee's background includes prior service in the federal executive branch, the Judiciary Committee as a whole, or some of its members, can be expected to seek access to records of the nominee's written work product from that service. Sometimes, however, a President might resist such requests, citing the need to protect the confidentiality of advice provided, or decisions made, by the nominee while having served within an Administration—and typically invoking an "executive privilege" or attorney-client privilege to support his refusal to make such information available to the Judiciary Committee.[10] In such an event, committee members or their staff might then devote a significant amount of time, prior to confirmation hearings, to identifying and justifying disclosure of specific kinds of documents that would aid the committee in making a more informed evaluation of the nominee—as well as to examining whatever documents are eventually released. In some cases, the committee may be in a position to exert leverage over an Administration, particularly when a majority of the committee's members are insistent that at least some executive branch documents be released before the committee will act on the nomination. This, a CRS report notes, was the case in 1986, when the Judiciary Committee prepared to consider the nomination of William H. Rehnquist to be Chief Justice.

> During the confirmation proceeding for the elevation of Justice Rehnquist to be Chief Justice, the Judiciary Committee sought documents that he had authored on controversial subjects when he headed DOJ's Office of Legal Counsel. President Reagan asserted executive privilege, claiming the need to protect the candor and confidentiality of the legal advice submitted to Presidents and their assistants. But with opponents of Rehnquist [in the Judiciary Committee] gearing up to issue a subpoena, the nomination of not only Rehnquist but that of Antonin Scalia to be an Associate Justice, whose nominations were to be voted on in tandem, were in jeopardy. President Reagan agreed to allow the Committee access to a smaller number of documents, and Rehnquist and Scalia were ultimately confirmed.[11]

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[9] In such a context, some members of the Judiciary Committee, prior to confirmation hearings for Supreme Court nominee Sonia Sotomayor in 2009, sought for the committee internal documents of the Puerto Rican Legal Defense and Education Fund (PRLDEF). Prior to becoming a federal judge, Judge Sotomayor, at various points during the period 1980-1992, had worked for PRLDEF, including as a board member. Soon after being nominated to the Court, Judge Sotomayor provided the Judiciary Committee with documents that she had contributed to or helped write as a board member. Subsequently, however, some Judiciary Committee members requested more information, from the fund itself, about cases it had handled and policy positions it took while Sonia Sotomayor was working on its behalf, and ultimately the fund provided some of these requested materials to the Judiciary Committee. See Tom LoBianco, "Nominee Advised Critics of Bork; Legal Funding Tied to Sotomayor," *The Washington Times*, July 2, 2009, p. A8; also, "Papers Irrelevant, White House Says," *The Washington Times*, July 3, 2009, p. A2.

[10] In this vein, when President George W. Bush was asked at a news conference whether he would release to the Judiciary Committee some or all of Supreme Court nominee Harriet E. Miers's legal work as White House counsel, he replied, "I just can't tell you how important it is for us to guard executive privilege in order for there to be crisp decision making in the White House." Richard W. Stevenson, "President, Citing Executive Privilege, Indicates He'll Reject Requests for Counsel's Documents," *The New York Times*, October 5, 2005, at http://www.nexis.com. For the views, against the backdrop of the Miers nomination, of a range of legal scholars on the extent to which a President may properly invoke executive privilege to deny the Senate the work product of a White House counsel nominated to the Supreme Court, see Marcia Coyle, "Battle Looming over Privilege," *The National Law Journal*, vol. 28, October 10, 2005, pp. 1, 21.

[11] CRS Report RL32935, *Congressional Oversight of Judges and Justices*, by Elizabeth B. Bazan. The report, under the heading "Judicial Nominations," provides a more detailed narrative of the 1986 conflict between the Judiciary Committee and the Reagan Administration over the Rehnquist documents provided in Louis Fisher, *The Politics of Executive Privilege* (Durham, NC: Carolina Academic Press, 2004), pp. 76-77.

(continued...)

In addition to the committee's own investigation of the nominee, confidential FBI reports on the nominee are another important information source. These are available only to committee members and a small number of designated staff under strict security procedures designed to prevent unauthorized disclosure.

Courtesy Calls

During the pre-hearing stage, the nominee, in accordance with long-standing tradition, visits Capitol Hill to pay "courtesy calls" on individual Senators in their offices. For Senators not on the Judiciary Committee, that may be the only opportunity to converse in person with the nominee before voting on his or her confirmation to the Court. Senators may use these meetings to gain firsthand impressions of the nominee and to discuss with the nominee issues that are important to them in the context of the nomination.[12]

Evaluation by the American Bar Association

Also during the pre-hearing stage, the nominee is evaluated by the American Bar Association's Standing Committee on the Federal Judiciary,[13] which is publicly committed to providing the Senate Judiciary Committee with an impartial evaluation of the qualifications of each Supreme Court nominee. A publication of the ABA committee stresses that each evaluation focuses strictly

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Comparable requests from the Judiciary Committee have produced mixed results in the case of President George W. Bush's Supreme Court nominees—John G. Roberts Jr., Harriet E. Miers, and Samuel A. Alito Jr., whose backgrounds all included service in either the Department of Justice, the White House, or both. The Bush Administration allowed the release of some documents from each of the three nominees' executive branch service, but refused the release of other documents. See, for example: David G. Savage and Henry Weinstein, "Files from Roberts' Reagan Years Are Released," *Los Angeles Times*, August 16, 2005, p. 12; William Branigin, "Bush Will Not Release All Miers Documents," *The Washington Post*, October 24, 2005, at http://www.washingtonpost.com; and Susan Milligan, "Top Democrats Question Alito's Credibility," *Boston Globe*, December 2, 2005, at http://www.nexis.com.

[12] Several weeks before the start of confirmation hearings on her nomination, the most recent appointee to the Court, Elena Kagan, had reportedly made courtesy calls to "more than 50" Senate offices. Sheryl Gay Stolberg, "A Knock-Down, Drag-Out—Yawn," *The New York Times*, June 3, 2010, p. 19. President Obama's first Supreme Court nominee, Sonia Sotomayor, reportedly made courtesy calls to 89 Senators prior to the start of her confirmation hearings on July 13, 2009. Mark Sherman, "Sotomayor Arrives, Supreme Court Hearing Under Way," Associated Press Financial Wire, July 13, 2009, at http://www.nexis.com. The nominee immediately prior to Sotomayor, Samuel A. Alito Jr., was reported to have met privately with more than 80 Senators between his nomination on November 10, 2005, and his confirmation on January 24, 2006. Jesse J. Holland (Associated Press), "Senate Moves Toward Alito's Confirmation," *Las Vegas Sun*, January 25, 2006, at http://www.lasvegassun.com. Of the two Supreme Court nominees who immediately preceded Alito, John G. Roberts Jr. and Harriet E. Miers, one paid numerous courtesy calls to Senate offices, while the other made fewer. "By the time Justice Roberts took the oath before the Senate Judiciary Committee, he had met with more than half of the 100 members of the Senate." By contrast, a week prior to the withdrawal of her nomination, Miers was reported to have met "with only about 25 senators," reportedly because the meetings that had been held "had been fraught with misunderstandings and disagreements, giving ammunition to detractors.... " Charles Hurt, "Miers to End Her Meetings with Senators; Supreme Court Nominee Will Cram for Hearings," *The Washington Times*, October 21, 2005, p. A1.

[13] Traditionally, this evaluation role has been performed at the official invitation of the chair of the Senate Judiciary Committee. In 1947, the ABA committee was first invited by the committee's chair, Sen. Alexander Wiley (R-WI), to testify or file a recommendation on each judicial nomination receiving a hearing. Grossman, Joel B. *Lawyers and Judges: The ABA and the Politics of Judicial Selection* (New York: John Wiley and Sons Inc., 1966), p. 64. A central purpose of the Judiciary Committee, when it first invited the ABA committee to evaluate judicial nominees, was to "help insure that only the highest caliber [of] men and women ascended to the bench.... " Statement of Sen. Joseph R. Biden Jr., chair of the Senate Judiciary Committee, in U.S. Congress, Senate Committee on the Judiciary, *The ABA Role in the Judicial Nomination Process*, hearing,101st Cong., 1st sess., June 2, 1989 (Washington: GPO, 1991), p. 2.

on the candidate's "professional qualifications: integrity, professional competence and judicial temperament" and does "not take into account [his or her] philosophy, political affiliation or ideology."[14] Performance of this evaluation role, the committee states, is intended to help "ensure that the most qualified persons serve on the federal judiciary."[15] At the culmination of its evaluation, the ABA committee votes on whether to rate a nominee "well qualified," "qualified," or "not qualified."[16]

The rating of the ABA committee is then reported to each member of the Senate Judiciary Committee, as well as to the White House, the Department of Justice, and the nominee.[17] Invariably, a nominee's ABA rating receives prominent news coverage when it is sent to the Senate Judiciary Committee. In the past, a unanimously positive rating by the ABA committee has almost always presaged a favorable report by the Judiciary Committee on the nominee as well. Conversely, a divided vote, or less than the highest rating, by the ABA committee usually served to flag issues about the nominee for the Senate Judiciary Committee to examine at its confirmation hearings, and these issues in turn have sometimes been cited by Senators on the Judiciary Committee who voted against reporting a nomination favorably to the Senate floor.

For the most part, from its inception in the late 1940s, and continuing through the next three decades, the ABA committee evaluated Supreme Court nominees, as well as nominees to lower court judgeships, with bipartisan support in the Senate. In the 1980s and 1990s, however, the committee came under criticism from some Senators who questioned its impartiality and the usefulness of its evaluations to the Judiciary Committee.[18] Notwithstanding those criticisms, and variations in the recognition afforded it by chairs of the Judiciary Committee,[19] the ABA

[14] American Bar Association, *The ABA Standing Committee on the Federal Judiciary: What It Is and How It Works*, p. 1, at http://www.abanet.org/scfedjud/federal_judiciary09.pdf.

[15] Ibid. All 15 members of the ABA committee take part in its evaluation of a Supreme Court nominee. Committee members conduct confidential interviews nationwide with practicing lawyers, judges, law professors, and others "who are in a position to evaluate the prospective nominee's integrity, professional competence and judicial temperament." Meanwhile, teams of law school professors, as well as a separate team of practicing lawyers, examine the legal writing of a nominee. The nominee as well is interviewed, specifically by the committee member or members from the judicial circuit where the nominee has practiced or served as a judge; the chair of the committee also may participate in the interview, if he or she so chooses. The results of all of these inquiries are forwarded to the full ABA committee.

[16] Since the inception of the ABA committee's evaluating role, most, but not all, Supreme Court nominees have received the highest ABA rating of "well qualified," while no nominees have been rated by a committee majority to be "not qualified."

[17] The rating is also posted for the public record on the ABA committee's website at http://www.americanbar.org/groups/committees/federal_judiciary/ratings.html.

[18] The ABA committee has, in the past, been accused by some Senators, as well as by some conservative groups, of holding a liberal ideological bias. The committee's ratings of judicial nominees Robert H. Bork in 1987 and Clarence Thomas in 1991 in particular were cited as demonstrating prejudice against nominees with conservative judicial philosophies. The ABA rating of Bork was unusual in that none of the committee's 15 members voted for the intermediate "qualified" rating—instead, 10 members rated Bork as "well qualified," 4 members rated him "not qualified," and 1 member voted "not opposed." For the Thomas nomination, 12 of the committee's 15 members found the nominee "qualified," 2 found him "unqualified," and 1 abstained. None rated him "well qualified." The mid-level rating of "qualified" of the Thomas nomination by the 12-member majority was in contrast to the "well qualified" ratings that the ABA panel had unanimously given the two previous Supreme Court nominees, David H. Souter and Anthony M. Kennedy. More recently, during the G.W. Bush presidency, the ABA committee unanimously rated John G. Roberts Jr. as "well qualified," as well as Samuel A. Alito Jr. (with one recusal).

[19] In 1997, Senator Orrin G. Hatch (R-UT), as chair of the Judiciary Committee, announced that, during his chairmanship, the ABA committee would no longer be accorded an "officially sanctioned role" in the judicial confirmation process. "One cannot assume," Chairman Hatch wrote, "that a group as politically active as the ABA can at the same time remain altogether neutral, impartial and apolitical when it comes to evaluating judicial qualifications." Sen. Orrin G. Hatch, Letter to Colleagues on the Senate Judiciary Committee, February 24, 1997; also, Associated (continued...)

committee has continued, in recent Congresses, to appear on a regular basis before the Judiciary Committee under both Republican and Democratic chairs. In keeping with long-standing practice, the ABA committee chair was the first public witness to testify at Supreme Court confirmation hearings in 2005, 2006, and 2009—to explain the ABA committee's rating of nominees John G. Roberts Jr., Samuel A. Alito Jr., and Sonia Sotomayor, respectively.[20] At the Alito hearings, the then-chair of the Judiciary Committee, Senator Arlen Specter (R-PA), observed that, in receiving the testimony of outside witnesses at Supreme Court confirmation hearings, "our tradition is to hear first from the American Bar Association and their evaluation of the judicial nominee."[21] Most recently, in 2010, in a minor break from this tradition, the ABA committee chair was not the first public witness to testify at the confirmation hearings for Supreme Court nominee Elena Kagan, but testified in a third panel of public witnesses (testifying first among those panelists).[22]

Public Debate

Meanwhile, it is common, well before the start of confirmation hearings, for public debate to begin on a nominee's qualifications and on the meaning of the nomination for the future of the Court. Much of this debate is waged by commentators in the news media and increasingly, in recent years, on Internet sites and by advocacy groups that actively support or oppose a nominee.[23] Senators, too, sometimes contribute to this debate in Senate floor statements or other

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Press, "Hatch Hits ABA's Screening Role, *The Washington Post*, February 19, 1997, p. A4. However, in 2001, the Judiciary Committee's next chair, Senator Patrick J. Leahy (D-VT), restored to the ABA committee a quasi-official evaluating role, stating that the Judiciary Committee's Democratic members would oppose votes on any of President George W. Bush's judicial nominees who were not first reviewed by the ABA committee. Audrey Hudson, "Democrats Want ABA to Vet Judges," *The Washington Times*, March 28, 2001, p. A4; "Democrats Say ABA's Vetting of Nominees Still Counts," *The Washington Post*, March 28, 2001, p. A5. See also, for discussion of the ABA committee's role in evaluating judicial candidates, Sen. Patrick J. Leahy, "Nomination of Morrison C. England, Jr. To Be United States District Judge for the Eastern District of California," *Congressional Record*, daily edition, vol. 148, August 1, 2002, p. S7814.

[20] U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of John G. Roberts Jr. To Be Chief Justice of the United States*, 109th Cong., 1st sess., September 12-15, 2005 (Washington: GPO, 2005), pp. 451-455; U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Samuel A. Alito Jr. To Be an Associate Justice of the Supreme Court of the United States*, 109th Cong., 2nd sess., January 9-13, 2006 (Washington: GPO, 2006), pp. 641-654; (Hereinafter cited as Senate Judiciary Committee, *Confirmation Hearing on John G. Roberts*, and Senate Judiciary Committee, *Confirmation Hearing on Samuel A. Alito.*); "Senate Judiciary Committee Holds Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court," *CQ Congressional Transcripts*, July 16, 2009, at http://www.CQ.com.

The ABA committee unanimously, in each instance, gave Roberts, Alito, Sotomayor, and Kagan its "well qualified" rating.

[21] Senate Judiciary Committee, *Confirmation Hearing on Samuel A. Alito*, p. 640.

[22] See "Continuation of the Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States—Official Hearing Notice/Witness List," Senate Judiciary Committee, July 1, 2010, at http://judiciary.senate.gov/hearings/hearing.cfm?id=4679.

[23] For an account of interest group support of, or opposition to, recent Supreme Court nominations during the pre-hearing stage, see "Interest Groups React," *The National Law Journal*, vol. 31, June 1, 2009, p. 23 (reporting, less than a week after the selection of Sonia Sotomayor as a Supreme Court nominee, that her nomination "drew fervent praise and equally impassioned criticism"); David D. Kirkpatrick, "For Conservative Christians, Game Plan on the Nominee," *The New York Times*, August 12, 2005, p. 15; Jo Becker, "Television Ad War on Alito Begins; Liberals Try to Paint Court Pick as Tool of the Right Wing," *The Washington Post*, November 18, 2005, p. A3. For overviews of the role that interest groups played during an entire appointment process (from the point of Justice Sandra Day O'Connor's retirement announcement until the point that her successor, Samuel A. Alito Jr., was confirmed), see Lois Romano and Julie Eilperin, "Republicans Were Masters in the Race to Paint Alito; Democrats' Portrayal Failed to Sway the Public," *The Washington Post*, February 2, 2006, p. A1; David D. Kirkpatrick, "Paving the Way for Alito Began in Reagan (continued...)

public remarks.[24] Moreover, if a nominee is not quickly selected, groups who see their interests to be at stake by a new Court appointment can be expected to begin mobilizing members, or seeking to affect public or Senate opinion, before the President even selects a nominee. Their purpose in doing so might be to influence the President's choice or to galvanize the groups' members and political allies in anticipation of whomever the President ultimately chooses to nominate.[25]

If the President's choice of a nominee proves to be divisive, the pre-hearing phase will be of strategic concern to both those groups which support the nominee's nomination, as well as to those groups which oppose it. During this phase, a political analyst has noted, "both sides will move quickly to try to define the nominee."[26] The analysis, published in July 2005, only days after Justice Sandra Day O'Connor announced her intention to retire, considered what might happen if President George W. Bush's choice to succeed Justice O'Connor immediately polarized the Senate along party lines. In that event, it predicted the following scenario prior to the nominee's confirmation hearings:

> First impressions are lasting impressions. If Republicans can create a positive image of a Bush Supreme Court nominee in the public's mind right out of the gate, that could help the nominee withstand later efforts by critics to portray him or her as an extremist. Conversely, if Democrats can quickly paint the president's choice as ideologically driven and far out of the mainstream, that could be a deathblow.[27]

However, even if a nominee is not a "consensus" choice attracting immediate support across the political spectrum, the pre-hearing stage will not necessarily be marked by sharp polarization in the Senate (or by the immediate emergence of Senate opposition). Such partisan division, for instance, was absent when President G.W. Bush, on July 19, 2005, announced his selection of U.S. appellate court judge John G. Roberts Jr. to succeed Justice O'Connor. While "[l]iberal advocacy groups immediately assailed Roberts for his positions on abortion and other issues," and "Republican senators quickly rallied behind Roberts," Senate Democrats withheld immediate criticism of the nominee—reportedly out of concern about falling into what the Senate Democratic leader, according to aides, "considered a Republican trap of condemning a nominee before hearings."[28]

Similarly, after President Obama selected Sonia Sotomayor, Republican Senators spoke "in cautious but measured tones about Sotomayor's qualifications and fitness for the court while

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Era," *The New York Times*, January 30, 2006, pp. A1, A18.

[24] Several Senators, for example, spoke favorably of Elena Kagan's nomination prior to hearings being held on her nomination. See floor remarks by Sens. Amy Klobuchar, Debbie Stabenow, and Jeanne Shaheen in "Nomination of Elena Kagan," Remarks in the Senate, *Congressional Record*, daily edition, June 16, 2010, p. S4956. Other Senators expressed concern with the nomination prior to Ms. Kagan's hearings. See, for example, floor remarks by Sen. Jon Kyl in "Nomination of Elena Kagan," Remarks in the Senate, *Congressional Record*, daily edition, May 17, 2010, p. S3796.

[25] In this vein, a news account reported that *before* George W. Bush's announcement, on July 19, 2005, of his selection of John G. Roberts Jr. to succeed Associate Justice Sandra Day O'Connor, the "prospect of filling the first Supreme Court vacancy in 11 years" had "already mobilized political forces on both sides to raise vast financial resources in preparation for a struggle akin to a presidential campaign. From the moment O'Connor announced her retirement July 1, interest groups have been airing television and Internet advertising, blitzing supporters with e-mail, and pressuring elected officials to stand strong." Peter Baker and Jim VandeHei, "Bush Chooses Roberts for Court," *The Washington Post*, July 20, 2005, p. A1. (Hereinafter cited as Baker, "Bush Chooses Roberts".)

[26] Kirk Victor, "The Senate Showdown," *National Journal*, vol. 37, July 9, 2005, p. 2185.

[27] Ibid., p. 2186.

[28] Baker, "Bush Chooses Roberts," p. A1.

Democrats" joined "the White House in singing her praises."[29] Another news account noted that "Senate Republicans responded with restraint to the announcement [of Sotomayor's nomination], and their largely muted statements stood in sharp contrast to the fractious partisanship that has defined court battles in recent decades."[30]

Preparation for Hearings

As confirmation hearings approach, Judiciary Committee members and staff closely study the public record and investigative information compiled on the nominee,[31] and with the benefit of such research, they prepare questions to pose at the hearings. Sometimes committee members indicate in advance, either publicly or by communicating directly with the nominee, the kind of questions they intend to ask at the hearings.[32]

For his or her part, the nominee also intensively prepares for the hearings, focusing particularly on questions of law and policy likely to be raised by committee members. The Administration assists the nominee in this effort by providing legal background materials and by conducting mock hearing practice sessions for the nominee. At these sessions—also called "murder boards," because of "their grueling demands on a judicial nominee"[33]—the nominee is questioned on the full range of legal and constitutional issues that Senators on the Judiciary Committee can be expected to raise at the nominee's confirmation hearings.[34]

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[29] Associated Press, "Interest groups engaged in Sotomayor battle," May 28, 2009.

[30] Shailagh Murray and Michael D. Shear, "Obama Names Sotomayor to Supreme Court," *The Washington Post*, May 27, 2009, available online at http://www.washingtonpost.com/wp-dyn/content/article/2009/05/26/AR2009052601313.html.

[31] See, for example, "Hanna Rosin," "They're Fishing on the Hill, but It's No Vacation," *The Washington Post*, August 4, 2005, p. C1 (describing the work of the "Noms Unit," a "special unit of the 50-member Democratic staff of the Senate Judiciary Committee, which in early August 2005 was tasked with investigating the background and past writings or statements of Supreme Court nominee John G. Roberts prior to Roberts's confirmation hearings scheduled to begin early the next month); see also Sheryl Gay Stolberg, "Out of Practice, Senate Crams for Battle over Court Nominee," *The New York Times*, July 8, 2005, pp. A1, A20 (describing the investigative and research roles of Republican staff on the Senate Judiciary Committee in early July 2005, as it prepared for President George W. Bush to select a nominee to succeed retiring Associate Justice Sandra Day O'Connor).

[32] See, for example, Seth Stern, "Leahy Says He Will Ask Roberts About So-Called Torture Memo," *CQ Today*, August 29, 2005, at http://www.cq.com; Gary Delsohn, "Feinstein to Seek Roberts' Abortion Views"), *Sacramento Bee*, August 25, 2005, p. A1, at http://www.nexis.com; Sen. Arlen Specter, Letter to Hon. John G. Roberts Jr., August 23, 2005. In his August 23, 2005, letter, Sen. Specter, then chair of the Judiciary Committee, began by stating, "Supplementing my letter on the Commerce Clause, this letter deals with Supreme Court decisions on the Americans with Disabilities Act (ADA), which I intend to ask you about at your confirmation hearing."

[33] Elisabeth Bumiller, "Lengthy Practices Prepare Court Nominee for his Senate Hearings," *The New York Times*, September 1, 2005, p. A11.

[34] Prior to the start of her confirmation hearings in July 2009, Supreme Court nominee Sonia Sotomayor reportedly "endured weeks of insults, obnoxious questions and unwelcome drilling into her work as a judge and a lawyer—and it was all on purpose, essentially a dress rehearsal for her confirmation hearings." Jesse J. Holland (The Associated Press), "Mock Exercises Prepare Sotomayor for Hearings," *The Washington Post*, July 10, 2009, at http://www.washingtonpost.com. A day before the start of the confirmation hearings, another story reported, quoting an Administration official, that Judge Sotomayor "and her helpers have been 'going over questions she would expect to be asked,' based on her record and what she has discussed in visits with senators over the last few weeks." Neil A. Lewis, "Nominee Wraps Up Rehearsals" *The New York Times*, July 12, 2009, p. 16.

In preparation for his confirmation hearings in September 2005, Associate Justice nominee John G. Roberts Jr. reportedly "participated in some 10 mock hearings of two to three hours each at the Justice Department, where administration lawyers and a revolving cast of Judge Roberts's colleagues and friends baited him with queries, including those they anticipated from the three Democratic senators who are widely expected to be toughest on the nominee.... " Ibid. After Judge Roberts's hearings were postponed (following the withdrawal of his Associate Justice (continued...)

Hearings

In 1955, hearings on the Supreme Court nomination of John M. Harlan marked the beginning of a practice, continuing to the present, of each Court nominee testifying in-person before the Senate Judiciary Committee.[35] Additionally, in 1981, Supreme Court confirmation hearings were opened to gavel-to-gavel television coverage for the first time when the committee instituted the practice at the confirmation hearings for nominee Sandra Day O'Connor.

A confirmation hearing typically begins with a statement by the chair of the Judiciary Committee welcoming the nominee and outlining how the hearing will proceed.[36] Other members of the committee follow with opening statements, and a panel of "presenters" introduces the nominee to the committee.[37] It is then the nominee's turn to make an opening statement, after which begins the principal business of the hearing—the questioning of the nominee by Senators serving on the Judiciary Committee. Typically, the chair begins the questioning, followed by the ranking minority Member and then the rest of the committee in descending order of seniority, alternating between majority and minority members, with a uniform time limit for each Senator during each round.[38] When the first round of questioning has been completed, the committee begins a second round, which may be followed by more rounds, at the discretion of the committee chair.[39]

(...continued)

nomination and then his re-nomination, this time to be Chief Justice), he apparently participated in even more mock hearings, for it was later reported that he "underwent at least a dozen murder boards in preparing for his hearings." Marcia Coyle, "Alito's 'Murder Board' a Mix of the Legal Elite," *The National Law Journal*, vol. 28, January 30, 2006, p. 7. Coyle, in the same article, reported that subsequently the next Supreme Court nominee, Samuel A. Alito Jr., also participated in a rigorous series of mock hearing sessions, in preparation for his confirmation hearings before the Senate Judiciary Committee in early January 2006. Alito, she noted, "was shepherded through all of the murder boards by a team that included Steve Schmidt, special advisor to the president in charge of the White House confirmation team, and Harriet Miers, counsel to the president." Coyle observed that the "well-handled U.S. Supreme Court nominee is now a fixture in the political process, and much of the credit goes to those so-called murder boards, or preparation sessions for the Senate confirmation hearings."

[35] But note that, in 1925, Harlan F. Stone became the first Supreme Court nominee to appear in-person and testify at his confirmation hearings. Notwithstanding Stone's appearance at his hearings in 1925, the Judiciary Committee, over the next 30 years, usually declined to invite Supreme Court nominees to testify if a confirmation hearing were held; as recently as 1954, for example, Earl Warren did not appear at his confirmation hearings to be Chief Justice.

[36] The chair's opening statement might also express views on the nomination and confirmation process or on the nominee. For example, then-Judiciary Chairman Senator Patrick Leahy stated, in his opening remarks during Supreme Court nominee Elena Kagan's confirmation hearing, that "Elena Kagan earned her place at the top of the legal profession. Her legal qualifications are unassailable.... I welcome questions to Solicitor General Kagan about judicial independence, but let us be fair. Let us listen to her answers. There is no basis to question her integrity and no one should presume that this intelligent woman, who has excelled during every part of her varied and distinguished career, lacks independence." National Public Radio, "Transcript: Leahy's Statement on Kagan Hearing," June 28, 2010, available online at http://www.npr.org/templates/story/story.php?storyId=128168185.

[37] The presenters often will include the Senators and, less frequently, Representatives from the state in which the nominee is a resident or the state in which the nominee was born or has resided for much of his or her life. Other presenters at recent Supreme Court confirmation hearings have included a former President (Gerald R. Ford, at the 1987 hearings for Robert H. Bork); the Attorney General (William French Smith, at the 1981 hearings for Sandra Day O'Connor, and Edward Levi, at the 1975 hearings for John Paul Stevens); a former Attorney General (Griffin B. Bell, at the 1986 hearings for William H. Rehnquist); and a former governor (Christine Todd Whitman, at the 2006 hearings for Samuel A. Alito Jr.).

[38] For example, for the three most recent nominations to the Court (Kagan, Sotomayor, and Alito), each Senator was allotted 30 minutes to question the nominee.

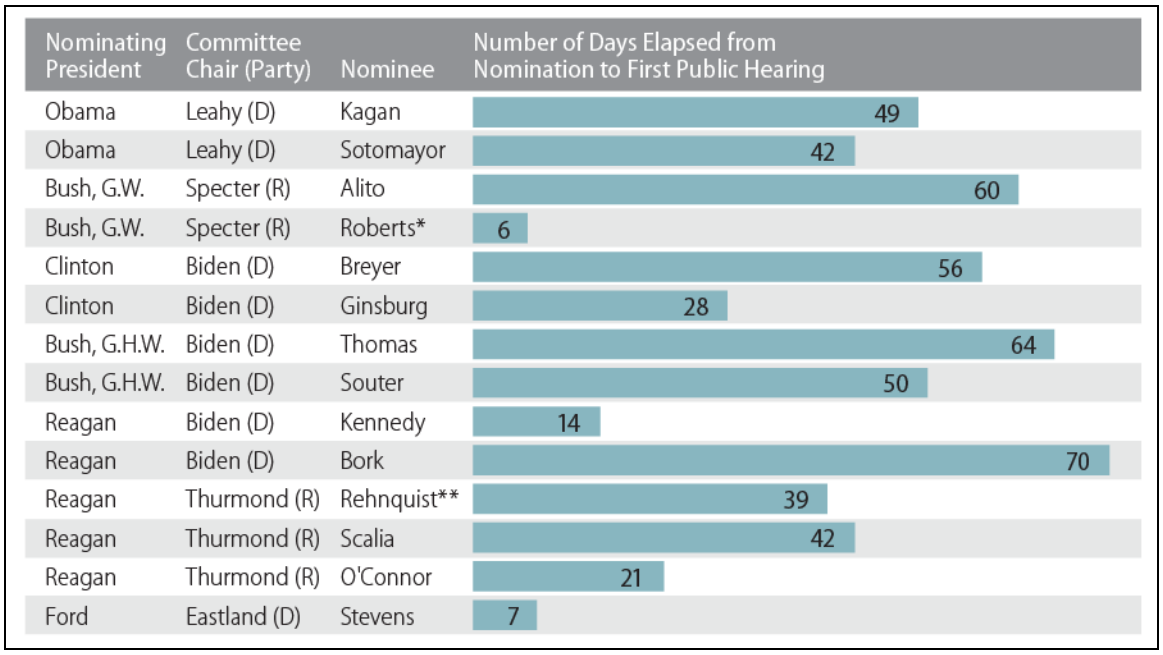
[39] Almost invariably, the questioning is conducted exclusively by members of the committee. However, on at least two occasions in the 20th century, a Senator who was not a committee member was allowed to join in the questioning of the (continued...)

Number of Days from Nomination to First Committee Hearing

For nominees since 1975 who have received hearings, **Figure 1** shows the number of days that elapsed from the date on which the nomination was formally submitted to the Senate to the date on which the nominee had his or her first hearing before the Judiciary Committee.[40]

Figure 1. Number of Days from Nomination to First Committee Hearing

(Nominees Receiving Hearing from 1975 to Present)



Source: Congressional Research Service

Notes: This figure shows, for nominees to the Supreme Court who received a hearing before the Senate Judiciary Committee from 1975 to the present, the number of days that elapsed from the date a nomination was submitted to the Senate to the date of the nominee's first committee hearing.

* John G. Roberts Jr. was initially nominated to the judgeship vacated by Justice Sandra Day O'Connor. Following the death of Chief Justice William Rehnquist, the Roberts nomination was withdrawn by President Bush and Mr. Roberts was subsequently renominated by President Bush to serve on the Court as Chief Justice. Mr. Roberts had his first committee hearing, as a nominee to replace Chief Justice Rehnquist, **45 days** after he was initially nominated to fill the O'Connor vacancy.

(...continued)

nominee. This first instance, in 1941, involved Sen. Millard E. Tydings (D-MD) at the confirmation hearings for nominee Robert H. Jackson; the second instance, in 1957, involved Sen. Joseph R. McCarthy (R-WI) at the confirmation hearings for nominee William J. Brennan Jr. See James A. Thorpe, "The Appearance of Supreme Court Nominees Before the Senate Judiciary Committee," *Journal of Public Law*, vol. 18, 1969, p. 378 (Jackson hearings) and p. 385 (Brennan hearings).

[40] It is not uncommon for a President to announce his choice for a vacancy prior to formally submitting the nomination to the Senate – but typically, at least for nominees since the mid-1970s, the nomination has been formally submitted to the Senate within approximately one week of the President's announcement. There are, however, exceptions. For example, 43 days elapsed between President Reagan's announcement that he was going to nominate Sandra Day O'Connor to the Court and when the President actually submitted her nomination to the Senate. For the purposes of **Figure 1**, the date on which the nomination is formally submitted (not the date on which the President announces who he intends to nominate) is used in the calculation. Using the date the nomination is submitted provides a better measure of how long a nominee waits for hearings to begin once his or her nomination is formally submitted to the Senate.

** William Rehnquist, who was already serving on the Court as an Associate Justice, was nominated by President Reagan to serve as the new Chief Justice once Chief Justice Burger stepped down from the Court. Justice Rehnquist's elevation to the Chief Justice position would itself create a vacancy for an Associate Justice, to which Mr. Scalia was nominated.

Of the 14 nominees listed in the figure, Robert Bork waited the greatest number of days (70) from nomination to his first committee hearing, while John G. Roberts Jr. waited the fewest number of days (6)—followed closely by John Paul Stevens (7).[41] The Bork nomination, controversial at the time, was ultimately rejected by the Senate, while the Roberts nomination, which was approved by the Senate, was to fill an immediate vacancy on the Court after Chief Justice Rehnquist's death in 2005. The circumstances surrounding the Bork and Roberts nominations may help explain their ranking as having the greatest and fewest number of days, respectively, from nomination to first committee hearing.

Overall, the average number of days from nomination to first committee hearing is approximately 39 days, while the median is 42 days.[42]

Of the six Presidents represented in **Figure 1**, four had at least one nominee who waited less than both the average and median length of time from nomination to first committee hearing—Presidents G.W. Bush (Roberts, 6 days), Clinton (Ginsburg, 28 days), Reagan (Kennedy, 14 days; O'Connor, 21 days), and Ford (Stevens, 7 days). Each of the nominees of Presidents Obama and G.H.W. Bush waited at least both the average and median number of days from nomination to first hearing (i.e., at least both 39 and 42 days, respectively).

There appears to be at least some relationship between the length of time a nominee waits for his or her first committee hearing and whether the Judiciary Committee reports the nomination favorably, unfavorably, or without recommendation—and, if reported favorably, whether the vote is a party-line vote.[43] Specifically, the longer a nominee waits for a hearing, the more likely his or her nomination is reported nearly or purely along party lines or reported in a manner other than favorably. This might indicate that nominations perceived as more controversial, or at least perceived as more likely to split Senators along party lines, wait longer to receive their first committee hearing. For example, of the five nominees listed in **Figure 1** who waited the fewest number of days from nomination to first committee hearing, four (Ginsburg, O'Connor, Kennedy, Stevens) were favorably reported by the Judiciary Committee with unanimous support. In contrast, the three nominees who waited the greatest number of days for hearings to begin—Bork, Thomas, and Alito—were reported unfavorably, without recommendation, and by a party-line vote, respectively.

Purposes of Questioning the Nominee

For members of the Judiciary Committee, questioning of the nominee may serve various purposes. As already noted, for Senators who are undecided about the nominee the hearings may shed light on the nominee's fitness, and hence on how they should vote. Other Senators, as the

[41] Of nominees confirmed by the Senate, Clarence Thomas waited the longest from nomination to first committee hearing (64 days).

[42] The mean is equivalent to the arithmetic average. The mean or average is calculated by adding a group of numbers and then dividing that value by how many numbers there are, while the median is the middle value for a particular set of numbers (i.e., half of the numbers are above the median and half of the numbers are below it). Although the average or mean is a more commonly used measure, the median is less affected by outliers or extreme cases (e.g., nominees for whom the time from nomination to first committee hearing was relatively much shorter or longer than it was for other nominees). Consequently, the median might be a better measure of central tendency.

[43] Committee reporting of nominations is discussed further below in "Reporting the Nomination."

hearings begin, may already be "reasonably certain about voting to confirm the nominee," yet "also remain reasonably open to counter-evidence," and thus use the hearings "to pursue a line of questioning designed to probe the validity of this initial favorable predisposition."[44] Still others, however, may come to the hearings "having already decided how they will vote on the nomination" and, accordingly, use their questioning of the nominee to try "to secure or defeat the nomination."[45]

A Senator may even be initially undecided about whether he or she supports a nominee of a President belonging to the same party as the Senator. One reason for this is that a Senator might question whether a nominee is sufficiently committed to a particular judicial philosophy or ideological perspective—and, consequently, might view the committee hearings as important in determining whether a nominee might be supportive of the Senator's preferred judicial philosophy or ideological disposition.[46]

For some Senators, the hearings may be a vehicle through which to impress certain values or concerns upon a nominee in the hope of influencing how he or she might approach issues later as a Justice.[47] The hearings also may represent to some Senators an opportunity to draw the public's attention to certain issues, to advocate their policy preferences, or to associate themselves with concern about certain problems. Senators, it has also been noted, "may play multiple roles in any given hearing."[48]

Types of Questions Posed to Nominee

In recent decades, most nominees have undergone rigorous questioning in varying subject areas. They have been queried, as a matter of course, about their legal qualifications, private backgrounds, and earlier actions as public figures. Other questions have focused on social and political issues, the Constitution, particular Court rulings, current constitutional controversies, constitutional values, judicial philosophy, and the analytical approach a nominee might use in deciding issues and cases.[49]

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[44] George L. Watson and John A. Stookey, *Shaping America: The Politics of Supreme Court Appointments* (New York, HarperCollins College Publishers, 1995), p. 150. (Hereinafter cited as Watson and Stookey, *Shaping America*.).

[45] Ibid., p. 152.

[46] For example, following President G.W. Bush's nomination of Harriet Miers, Senator John Thune (R-SD) stated that "conservatives see this (nomination) as having enormous stakes, that's why there's a lot of anxiety and uncertainty as to where she's really going to come down," and that in her committee hearings "she's going to have to give a very good insight into her judicial philosophy, whether she's an originalist, whether she's exercise judicial restraint. Those hearings are going to be enormously important." Tom Curry, "Sen. Brownback is key to nominee Miers' fate," *NBC News*, October 6, 2005, online at http://www.nbcnews.com/id/9604860/ns/us_news-the_changing_court/t/sen-brownback-key-nominee-miers-fate/#.VeimfvnjB-M. Senator Sam Brownback (R-KS), a member of the Judiciary Committee at the time of the Miers nomination, stated, "there's precious little to go on and a deep concern that this would be a Souter-type candidate." Scott Benjamine, "Conservatives Divided On Miers, *CBS News*, October 5, 2005, available online at http://www.cbsnews.com/news/conservatives-divided-on-miers. Ultimately, Ms. Miers asked President G.W. Bush to withdraw her nomination prior to her first committee hearing.

[47] See Stephen J. Wermiel, "Confirming the Constitution: The Role of the Senate Judiciary Committee," *Law and Contemporary Problems*, vol. 56, Autumn 1993, p. 141, in which the author maintained that, since the 1987 hearings on Supreme Court nominee Robert H. Bork, a purpose of Senators on the Judiciary Committee has been "to identify points of constitutional concern and pursue those concerns with nominees, with the hope that, once confirmed, the new Justices will remember the importance of the core values urged on them by the senators or at least feel bound by the assurance they gave during their hearings."

[48] Watson and Stookey, *Shaping America*, p. 155.

[49] For additional information, see CRS Report R41300, *Questioning Supreme Court Nominees About Their Views on Legal or Constitutional Issues: A Recurring Issue*, by Denis Steven Rutkus.

Still other questions may concern past public statements made by the nominee, or (if the nominee has prior judicial experience) particular rulings handed down by the nominee.[50] To many Senators, eliciting testimony from the nominee may be seen as an important way to gain insight into his or her professional qualifications, temperament, and character. Some Senators, as well, may hope to glean from the nominee's responses signs of how the nominee, if confirmed to the Court, might be expected to rule on issues of particular concern to the Senators.[51]

For his or her part, however, a nominee might sometimes be reluctant to answer certain questions that are posed at confirmation hearings.[52] A nominee might decline to answer for fear of appearing to make commitments on issues that later could come before the Court.[53] A nominee also might be concerned that the substance of candid responses to certain questions could displease some Senators and thus put the nominee's chances for confirmation in jeopardy.[54]

For their part, committee members may differ in their assessments of a nominee's stated reasons for refusing to answer certain questions.[55] Some may be sympathetic and consider a nominee's

[50] For instance, at her confirmation hearings in July 2009, Supreme Court nominee Sonia Sotomayor was asked questions about public statements she had made prior to her nomination (and which opponents of her nomination had criticized) of appellate judges making policy and of the experiences of a "wise Latina woman" versus those of a white male judge. Senators on the Judiciary Committee also asked her about her participation in a controversial three-judge appellate panel ruling in a case involving reverse discrimination allegations by a group of white firefighters against city officials in New Haven, Connecticut (a ruling reversed by the Supreme Court in June 2009, after Judge Sotomayor's nomination to the Court but prior to the start of her confirmation hearings). See Tony Mauro, "During Senate Questioning, Sotomayor Explains Controversial Statements, Defends Rulings," *The National Law Journal,* July 15, 2009, at http://www.law.com;, Peter Baker and Neil A. Lewis, "Republicans Press Judge About Bias and Activism," *The New York Times*, July 15, 2009, pp. A1, A15; and Tom LoBianco, "Nominee Hit with Hot-Button Issues; Sotomayor Explains 'Wise Latina' Again," *The Washington Times*, July 16, 2009, p. A9.

[51] See, for example, Charles Babington, "On Question of Nominee Questions, No Clear Answer," *The Washington Post*, July 28, 2005, p. A6, which examined the issue facing Senators on the Judiciary Committee, prior to confirmation hearings for Supreme Court nominee John G. Roberts Jr, "of what should be asked and answered—or not answered—in confirmation hearings later this summer."

[52] See, for example, William G. Ross, "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals For Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees," *Tulane Law Review*, vol. 62, November 1987, pp. 109-174.

[53] Illustrative of such a concern was the following statement by nominee David H. Souter, at a September 14, 1990, hearing, explaining his refusal to answer a question concerning the issue of a woman's right, under the Constitution, to have an abortion: "Anything which substantially could inhibit the court's capacity to listen truly and to listen with as open a mind as it is humanly possible to have should be off-limits to a judge. Why this kind of discussion would take me down a road which I think it would be unethical for me to follow is something that perhaps I can suggest, and I will close with this question.

"Is there anyone who has not, at some point, made up his mind on some subject and then later found reason to change or modify it? No one has failed to have that experience. ... With that in mind can you imagine the pressure that would be on a judge who had stated an opinion, or seemed to have given a commitment in these circumstances to the Senate of the United States, and for all practical purposes, to the American people?" U.S. Congress, Senate Committee on the Judiciary, *Nomination of David Souter To Be Associate Justice of the Supreme Court of the United* States, hearings, 101st Cong., 2nd sess., September 13, 14, 17, 18 and 19, 1990 (Washington: GPO, 1991), p. 194.

[54] In this vein, one journalist has written, the perspective of Supreme Court nominee John G. Roberts Jr., as he prepared for his 2005 confirmation hearings, was that he "knew he could afford no mistakes. He worried that one answer, one ten-second response to one question over the course of fifteen hours of questioning, could doom his chances." Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007), p. 234.

[55] As early as 1959, at the confirmation hearings for Supreme Court nominee Potter Stewart, there is a record of Judiciary Committee members differing among themselves as to appropriateness of certain areas of questioning for the nominee. During the hearings, Sen. Thomas C. Hennings Jr. (D-MO) raised a point of order about interrogating a nominee on his "opinion as to any of the questions or the reasoning upon decisions which have heretofore ... [been] handed down" by the Supreme Court. The point of order, however, was overruled by the committee's chair, Sen. James (continued...)

refusal to discuss certain matters of no relevance to his or her fitness for appointment, or as illustrative of a commendable inclination not to be "pinned down" on current legal controversies. Others, however, may consider a nominee's views on certain subjects as important to assessing the nominee's fitness and hence regard unresponsiveness to questions on these subjects as sufficient reason to vote against confirmation.[56] Protracted questioning, occurring over several days of hearings, is likely if a nominee is relatively controversial or is perceived by committee members to be evasive or insincere in responding to certain questions, or if Senators perceive certain issues to merit extended discussion.[57]

Public Witnesses

After questioning of the nominee has been completed, the committee, in subsequent days of hearings, also hears testimony from public witnesses. As stated earlier, among the first to testify in recent decades has been the chair of the ABA's Standing Committee on the Federal Judiciary, who explains the committee's rating of a nominee. Other witnesses ordinarily include professional colleagues of a nominee[58] or representatives of advocacy groups which support or oppose a nominee.[59]

Closed-Door Committee Session

In a practice instituted in 1992, the Judiciary Committee also conducts a closed-door session with each Court nominee. This session is held to address any questions about the nominee's background that confidential investigations might have brought to the committee's attention. In announcing this procedure in 1992, the then-chair of the committee, Senator Joseph R. Biden Jr.

(...continued)

O. Eastland (D-MS), who stated the rule he would follow: "[I]f the nominee thinks that the question is improper, that he can decline to answer. And that when he declines, his position will be respected." L.A. Powe Jr., "The Senate and the Court: Questioning a Nominee," *Texas Law Review*, vol. 54, May 1976, p. 892, citing an unpublished transcript of the April 9 and 14, 1959, hearings of the Senate Judiciary Committee on the Supreme Court nomination of Potter Stewart, pp. 43-44.

[56] That noncommittal replies by a Supreme Court nominee may be regarded differently by Senators on the Judiciary Committee appeared to be borne out at the confirmation hearings in September 2005 for Chief Justice nominee John G. Roberts Jr. In his first day of testimony, Roberts "was Delphic," according to one news analysis, "and his supporters and critics each ended the day saying his performance had hardened their enthusiasm or their doubts." Todd S. Purdum, "With His Goal Clear, the Nominee Provides a Profile in Caution During Questioning," *The New York Times,* September 14, 2005, p. 25.

[57] For example, Judge Robert H. Bork, a controversial nominee of President Reagan's to be an Associate Justice, had 11 days of hearings during the period from September 15, 1987 to September 30, 1987. The Bork nomination was later rejected by a 42-58 vote on the Senate floor. In contrast, Judge Anthony M. Kennedy, nominated to the same vacancy for which Bork was rejected, had 3 days of hearings and was later confirmed by a unanimous vote of 97-0. More recently, Elena Kagan had four days of hearings, Sonia Sotomayor had four days, Samuel Alito Jr. had five days, and John Roberts Jr. had four days.

[58] If a nominee, for instance, is a sitting U.S. circuit court judge, one or more of the nominee's colleagues on the bench might testify on his or her behalf during the hearings. For example, at the time of his nomination, Samuel Alito served as a judge on the Third Circuit Court of Appeals (comprised of Delaware, New Jersey, and Pennsylvania). Two of Judge Alito's colleagues serving as active judges on the Third Circuit, Maryanne Trump Barry and Anthony J. Scirica, testified as witnesses on his behalf.

[59] Advocacy or interest groups, for example, with representatives testifying at recent Supreme Court hearings include the National Association of Women Judges (supporting Elena Kagan's nomination), Family Research Council (opposing Kagan), National Fraternal Order of Police (supporting Sonia Sotomayor's nomination), Americans United for Life (opposing Sotomayor), and the National Abortion and Reproductive Rights Action League Pro-Choice America (opposing Samuel Alito's nomination).

(D-DE), explained that such a hearing would be conducted "in all cases, even when there are no major investigative issues to be resolved so that the holding of such a hearing cannot be taken to demonstrate that the committee has received adverse confidential information about the nomination."[60]

The first such closed-door session was held for Supreme Court nominee Ruth Bader Ginsburg in 1993. Most recently, such sessions were held in 2005, 2006, 2009, and 2010 for nominees John G. Roberts Jr., Samuel A. Alito Jr., Sonia Sotomayor, and Elena Kagan, respectively. At the Roberts, Alito, and Kagan confirmation hearings, a very brief executive session was held after the Judiciary Committee had concluded all of its rounds of questions for the nominees but before it received outside witness testimony.[61] At the Sotomayor confirmation hearings, an executive session was held between the Judiciary Committee's first and second rounds of questions for the nominee.[62]

Reporting the Nomination

Reporting Favorably, Negatively, or Without Recommendation

Usually within a week of the end of hearings, the Judiciary Committee meets in open session to determine what recommendation to report to the full Senate. The committee may (1) report the nomination favorably, (2) report it negatively, or (3) make no recommendation at all on the nomination. A report with a negative recommendation or no recommendation permits a nomination to go forward, while alerting the Senate that a substantial number of committee members have reservations about the nomination.

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[60] Sen. Joseph R. Biden Jr., "Reform of the Confirmation Process," remarks in the Senate, *Congressional Record*, vol. 138, June 25, 1992, p. 16320.

[61] On February 15, 2005 (following a morning of public testimony by nominee John G. Roberts Jr.), the chair of the Judiciary Committee, Sen. Arlen Specter (R-PA), announced that the committee would immediately be going into executive session, "to ask the nominee on the record under oath about all investigative charges against the person if there were any." Such hearings, Chairman Specter said, "are routinely conducted for every Supreme Court nominee, even where there are no investigative issues to be resolved. In so doing, those outside the Committee cannot infer that the committee has received adverse confidential information about a nominee." Thirty-one minutes after proceeding to closed session, the committee reconvened in open session. Chairman Specter noted that the committee had reviewed "the background investigations on Judge Roberts, which were routine," and that he and the committee's ranking Member, Sen. Patrick J. Leahy (D-VT), had been "delegated to report that there are no disqualifying factors." (The committee then proceeded to hear outside witnesses in open session.) Senate Judiciary Committee, *Confirmation Hearing on John G. Roberts*, p. 450. See also Senate Judiciary Committee, *Confirmation Hearing on Samuel A. Alito*, p. 640, where, after a brief executive session, Chairman Specter, in public session, announced that the committee had "reviewed confidential data on the background of Judge Alito, and it was all found to be in order." Shortly before the conclusion of the Judiciary Committee's questioning of Court nominee Elena Kagan on June 30, 2010, the chair of the committee, Senator Patrick J. Leahy (D-VT), informed committee members, "We'll finish the questions … and then … we will … go to the traditional closed session. And the press won't be able to be there." [61] "Senate Judiciary Committee Holds Hearing on the Nomination of Solicitor General Elena Kagan to the U.S. Supreme Court, Day 3," *CQ Congressional Transcripts*, June 30, 2010, at http://www.CQ.com (no page numbering supplied).

[62] On July 15, 2009, after all the Judiciary Committee's members had participated in a first round of questions for Judge Sotomayor, the chair of the committee, Senator Leahy requested, without objection, "for the committee now proceeding to a closed session, which is a routine practice we've followed for every [Supreme Court] nominee since back when Senator Biden was chairman of the committee." Upon conclusion of the brief closed-door session, the committee resumed public hearings that afternoon, starting with its second round of questions for Judge Sotomayor. "Senate Judiciary Committee Holds Hearing on the Nomination of Judge Sonia Sotomayor to be an Associate Justice of the U.S. Supreme Court," *CQ Congressional Transcripts*, July 15, 2009, at http://www.CQ.com.

Figure 2 shows, for nominations reported by the Judiciary Committee since 1971, whether the nomination was reported favorably (identified in columns with blue dots) or other than favorably (identified in column with orange dots).[63] For nominations reported favorably, the level of support among committee members is indicated as follows: (1) unanimous support (i.e., no opposition by committee members); (2) almost unanimous support (opposition by one committee member); (3) some opposition (opposition by two or more committee members, but with the nomination also receiving the support of at least two members not belonging to the President's party); (4) almost party-line opposition (opposition by all but one committee member not belonging to the President's party); and (5) party-line opposition (opposition by all committee members not belonging to the President's party). The number of dots at the top of each column indicates the number of nominees in each particular category.

Of the 12 nominations reported favorably, 6 were reported with unanimous support (while another 1 was reported with almost unanimous support). None of the four most recent nominations to the Court were reported unanimously or almost unanimously. The Roberts nomination was reported with some opposition (three committee members not belonging to the President's party supported the nomination),[64] while the Sotomayor and Kagan nominations were reported with almost party-line opposition (only one committee member not belonging to the President's party supported the nominations).[65] Samuel Alito's nomination was reported with complete party-line opposition (only committee members belonging to the President's party voted to report the nomination favorably).

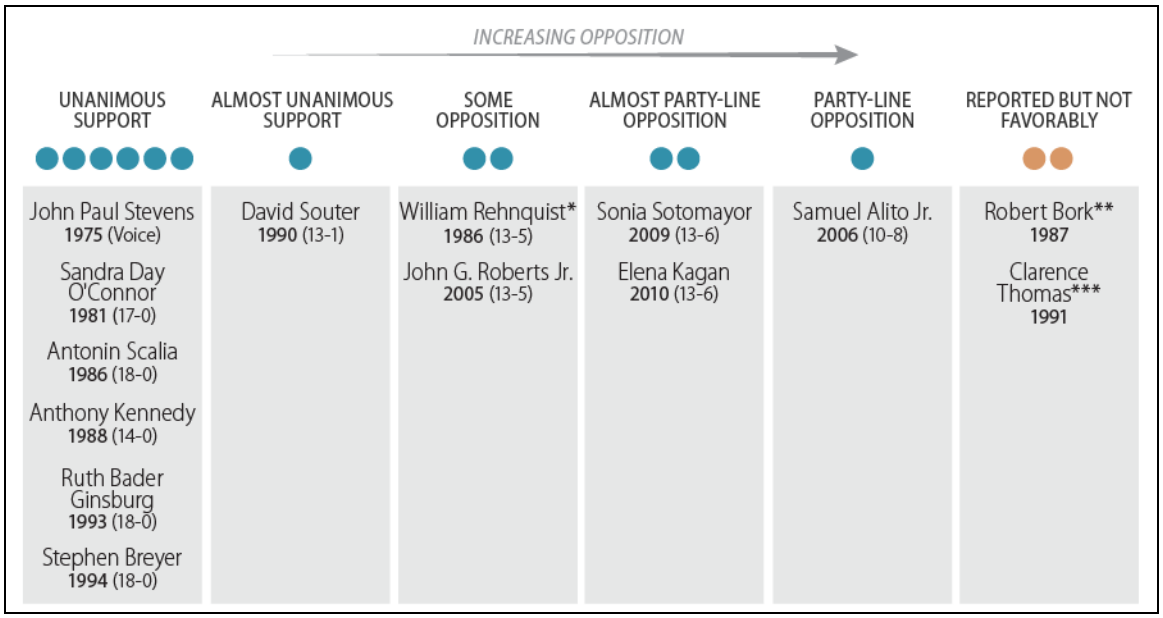
[63] The nomination of William Rehnquist to be Chief Justice is not included in **Figure 2** (as he was already serving as an Associate Justice on the Court at the time of his nomination). His nomination to be Chief Justice was reported favorably by the Committee with a 13-5 vote.

[64] Senators Patrick Leahy (D-VT), Herb Kohl (D-WI), and Russ Feingold (D-WI) voted to report the Roberts nomination favorably to the full Senate.

[65] Senator Lindsay Graham (R-SC) voted to report the Sotomayor and Kagan nominations favorably to the full Senate.

Figure 2. U.S. Supreme Court Nominees Reported by Senate Judiciary Committee

(1975 to Present)



Source: Congressional Research Service

Notes: This figure shows, for nominees whose nominations were reported by the Senate Judiciary Committee since 1971, whether the nomination was reported favorably (columns with blue dots) or other than favorably (column with pink dots). For nominations reported favorably, the level of committee support is indicated (e.g., whether the nomination received unanimous support or was opposed on a party-line vote).

* William Rehnquist, who was already serving on the Court as an Associate Justice, was nominated by President Reagan to serve as the new Chief Justice once Chief Justice Burger stepped down from the Court. Previously, Mr. Rehnquist (nominated by President Nixon) had been reported favorably out of committee by a vote of 12-4 on November 23, 1971, to be Associate Justice on the Court.

** Prior to the Judiciary Committee voting 9-5 to send the Bork nomination to the Floor with an unfavorable recommendation, the Committee voted 5-9 on a motion to report the nomination favorably (motion failed).

*** Prior to the Judiciary Committee voting 13-1 to send the Thomas nomination to the Floor without recommendation, the Committee voted 7-7 on a motion to report the nomination favorably (motion failed).

Two nominations included in **Figure 2** were not reported favorably, those of Robert Bork (reported unfavorably after the committee defeated a motion, 5-9, to report the nomination favorably)[66] and Clarence Thomas (reported without recommendation after the committee defeated a motion, 7-7, to report the nomination favorably).[67]

If a majority of its members oppose confirmation, the committee technically may decide not to report a nomination, which would prevent the full Senate from considering it. However, since its creation in 1816, the Judiciary Committee's typical practice has been to report even those

[66] The vote to report the Bork nomination favorably was almost a party-line vote. Senator Specter (R-PA) was the sole Republican on the committee to join with all of the committee's Democrats to oppose reporting the nomination favorably.

[67] The vote to report the Thomas nomination favorably was almost a party-line vote. Senator Dennis DeConcini (D-AZ) was the sole Democrat on the committee to join with all of the committee's Republicans to vote in support of reporting the nomination favorably.

Supreme Court nominations that were opposed by a committee majority,[68] thus allowing the full Senate to make the final decision on whether the nominee should be confirmed.[69]

This committee tradition was reaffirmed in June 2001 by the committee's then-chair, Senator Patrick J. Leahy (D-VT), and its then-ranking Member, Senator Orrin G. Hatch (R-UT), in a June 29, 2001, letter to Senate colleagues. The committee's "traditional practice," their letter stated,

> ... has been to report Supreme Court nominees to the Senate once the Committee has completed its considerations. This has been true even in cases where Supreme Court nominees were opposed by a majority of the Judiciary Committee.
>
> We both recognize and have every intention of following the practices and precedents of the committee and the Senate when considering Supreme Court nominees.[70]

During the 20th century, the Senate usually, but not always, agreed with Judiciary Committee recommendations that a Supreme Court nominee be confirmed. In other words, a favorable recommendation by the committee has, in a few instances (each occuring during the period 1968 to 1970), not been followed by Senate confirmation of the nomination.[71]

Historically, unfavorable committee reports, or reports without recommendation, have been precursors to nominations encountering substantial opposition in the full Senate, although a few of these nominations have eventually been confirmed by narrow margins.[72]

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[68] According to CRS data, since its creation in 1816, the Judiciary Committee has reported 106 Supreme Court nominations to the full Senate (while not reporting 8 nominations). Of the 106, seven were reported unfavorably (indicating substantial committee opposition)—those of John Crittenden (1829), Ebenezer R. Hoard (1869), Stanley Matthews (1881), Lucius Q.C. Lamar (1888), William B. Hornblower (1894), John J. Parker (1930), and Robert H. Bork (1987). Two nominations were reported without recommendation—those of Wheeler H. Peckham (1894) and Clarence Thomas (1991).

[69] Of the seven nominations reported unfavorably, two were approved by the Senate (Stanley Matthews and Lucius Q.C. Lamar). Of the two nominations reported without recommendation, one was approved by the Senate (Clarence Thomas).

[70] Sen. Patrick J. Leahy and Sen. Orrin G. Hatch, "Dear Colleague" Letter, June 29, 2001, *Congressional Record*, daily edition, vol. 147, June 29, 2001, p. S7282.

[71] The Senate disagreed with the Judiciary Committee's favorable assessment of a Supreme Court nominee three times in the 20th century, declining to confirm Supreme Court nominees Abe Fortas (to be Chief Justice) in 1968, Clement F. Haynsworth Jr. (as an Associate Justice) in 1969, and G. Harrold Carswell (as an Associate Justice) in 1970, even though their confirmation had been recommended by the committee. Note that Abe Fortas was already serving on the Court as an Associate Justice when he was nominated by President Lyndon Johnson to be Chief Justice.

At least once in the 19th century, the Senate, in 1873, questioned a favorable committee report on a nominee to the Court, recommitting the nomination of George H. Williams to be Chief Justice; the nomination later was withdrawn by the President, without having been reported out a second time by the committee. A year later, in 1874, the nomination of Caleb Cushing to be Chief Justice failed to receive Senate confirmation after being reported favorably by the Judiciary Committee. Soon after the committee's action and in the face of growing Senate opposition, the nomination was withdrawn by President Ulysses S. Grant without, however, having received formal Senate consideration. See Jacobstein and Mersky, *The Rejected*, pp. 82-87 (Williams), pp. 87-89 (Cushing), pp. 125-137 (Fortas), pp. 141-147 (Haynsworth), and pp. 147-155 (Carswell).

[72] As discussed previously, the following three Supreme Court nominations, though reported out of committee without a favorable recommendation, nonetheless were confirmed by the Senate: Stanley Matthews (1881), by a 24-23 vote; Lucius Q.C. Lamar (1888), by a 32-28 vote; and Clarence Thomas (1991), by a 52-48 vote. The remaining six nominations were rejected by the full Senate.

Printed Committee Reports

In recent decades, reporting to the Senate frequently has included a printed committee report, although the four most recently reported Supreme Court nominations were done so without printed reports.[73] Prepared behind closed doors, after the committee has voted on the nominee, the printed report presents in a single volume the views of committee members supporting a nominee's confirmation as well as "all supplemental, minority, or additional views ... submitted by the time of the filing of the report.... "[74] No Senate committee, however, is normally obliged to transmit a printed report to the Senate. Instead, the chair of the Judiciary Committee may simply file a one-page document reporting a nomination to the Senate and recommending whether the nomination should be confirmed.

A printed report, it can be argued, is valuable in providing for Senators not on the Judiciary Committee a review of all of the reasons that the committee's members cite for voting in favor or against a nominee.[75] A written report, however, might not always be considered a necessary reference for the Senate as a whole. For instance, in some cases, Senators not on the Judiciary Committee might believe they have received adequate information about a nominee from other sources, such as from news media reports or gavel-to-gavel video coverage of the nominee's confirmation hearings.[76] Further, preparation of a written report will mean additional days for a nomination to stay with the committee before it can be reported to the Senate.[77] In some situations, this might be viewed as creating unnecessary delay in the confirmation process, particularly if there is a desire to fill a Court vacancy as quickly as possible.[78]

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[73] From the 1960s through 2010, the Judiciary Committee reported 25 Supreme Court nominations to the Senate, 16 of which included transmittals of printed reports. During this time span, the nine Supreme Court nominations reported to the Senate without printed report were those of Byron W. White and Arthur J. Goldberg in 1962, Abe Fortas in 1965, Warren E. Burger in 1969, John Paul Stevens in 1975, and the four most recent Court nominations—those of John G. Roberts Jr. (for Chief Justice) in 2005, Samuel A. Alito Jr. in 2006, Sonia Sotomayor in 2009, and Elena Kagan in 2010.

[74] Rule 26, paragraph 10(c), *Standing Rules of the Senate.*

[75] This argument, for instance, was raised in 1969, after the nomination of Warren E. Burger to be Chief Justice was reported by the Judiciary Committee to the Senate floor without a printed report. During floor consideration of the nomination, three Senators expressed concern about the absence of a printed committee report. The Senators maintained that it was important for the Senate, when considering an appointment of this magnitude, to be able to consult a printed report from the Judiciary Committee that provided a breakdown of any recorded votes by the committee and an explanation of the committee's recommendation regarding the nominee. "The Supreme Court of the United States," debate in the Senate, *Congressional Record,* vol. 115, June 9, 1969, pp. 15174-15175 and 15192-15194. Shortly after this discussion, however, the Senate concluded debate on the Burger nomination and voted to confirm the nominee, 74-3.

[76] In one instance, involving the Supreme Court nomination of Ruth Bader Ginsburg in 1993, the Senate received the Judiciary Committee's printed report on the nomination on August 5, two days after voting to confirm the nominee. In that instance, it might be argued, the greater value of the committee's report, in being transmitted after the Senate's confirmation vote, was not as an advisory resource for the Senate but as an official record for posterity that reviewed the nature of the committee's investigation of the nominee and the reasons for committee members unanimously favoring the nominee's confirmation.

[77] A written report ordinarily is produced within a week of the committee vote. On infrequent occasions, however, the report may entail weeks of preparation if the nomination is controversial or if the report is regarded as possibly crucial in influencing how the full Senate will vote on the nomination. In 1970, for instance, the committee submitted its written report on nominee Clement F. Haynsworth Jr. more than a month after voting 10-7 to recommend that Judge Haynsworth be confirmed. (Subsequently the full Senate rejected the Haynsworth nomination by a 55-45 vote.)

[78] Concern that vacancies on the Court be filled as expeditiously as possible appeared to figure in the decisions to report two recent Supreme Court nominees, John G. Roberts Jr. and Samuel A. Alito Jr., to the Senate without printed report. Dispensing with a written report for Roberts was briefly discussed on the Senate floor on July 29, 2005, the day his first (continued...)

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(...continued)

nomination (for Associate Justice) was received by the Senate. (This nomination would later, on September 6, 2005, be withdrawn, with Roberts that same day re-nominated to be Chief Justice.) In a floor statement, the chair of the Judiciary Committee, Sen. Arlen Specter (R-Pa), described a joint agreement that he and the committee's ranking Member, Sen. Patrick J. Leahy (D-VT), had reached with the Senate's party leaders concerning the scheduling procedures for the confirmation hearings on the Roberts nomination. The particulars of the agreement, Senator Specter said, were shaped by what he said was the Senate's "duty to have the nominee in place" on the Court by the start of its next term on October 3, 2005. In the list of particulars agreed to (including the start of hearings by a set date and the waiving by members of the Judiciary Committee of their right under committee rules to hold over the nomination for one week when first placed on the committee's executive agenda), Judiciary Committee members from both parties, Senator Specter said, "would waive their right to submit dissenting or additional or minority views to the committee report." "Hearings on Supreme Court Nominee John Roberts," *Congressional Record*, daily edition, vol. 151, July 29, 2005, p. S9420. Senator Leahy as well, in a floor statement immediately after Senator Specter, indicated that the joint agreement allowed for dispensing with a written committee report on the Roberts nomination: "And we recognize," Senator Leahy stated, "that nothing in the Senate or Judiciary Committee rules precludes the Senate from considering the nomination on the floor without a committee report." Ibid.

The scheduling of a Judiciary Committee vote on the Alito nomination, without a printed report by the committee to follow, also appeared to be grounded on concerns of acting as quickly on the nomination as possible. In Chairman Specter's initial announcement, on November 3, 2005, of a schedule for the Judiciary Committee and Senate floor action on the Alito nomination, he specified that floor action was to begin the day after the committee's vote (hence not allowing time for preparation of a printed report). Senator Specter observed that the Court was then in the midst of its October 2005 term, with the possibility of various cases already heard by the Court having to be reargued, if the departure of outgoing Justice Sandra Day O'Connor during the term were to result in 4-4 decisions. Thus, Senator Specter said, it was important to the Court for the Senate to act on the Alito nomination "as promptly as possible." "Senator Specter and Leahy Hold News Conference on Hearings for Supreme Court Justice Nominee Alito," CQ.Com Newsmaker Transcripts, November 3, 2005, at http://www.cq.com.